

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(j))
of the Communications Act-Competitive)
Bidding 800 Mhz SMR)

DOCKET FILE COPY ORIGINAL

PP Docket No. 93-253

To: The Commission

**EX PARTE PRESENTATION
OF DCL ASSOCIATES, INC.**

I. Background

With reference to the Commission's Further Notice of Proposed Rule Making regarding the captioned proceedings, DCL Associates, Inc. ("DCL"), a management consulting firm engaged in the management of cellular and specialized mobile radio properties, hereby submits this Ex Parte Presentation pursuant to rule 1.1206. On January 5th, 1995, DCL filed its Initial Comments and on March 1st, 1995, DCL filed its Reply Comments in this proceeding. DCL's SMR client base represents many of America's minority groups (i.e. women, hispanics, and entrepreneurs). DCL and its clients/investors strongly desire to participate in any wide area SMR licensing process and, in light of proposed auctions, is currently considering participation in possible wide area SMR auctions.

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II. Rumours Of Mandatory Relocation, If True, Require That This Ex Parte Presentation Be Given Immediate Attention

Though the Commission stated in its Further Notice Of Proposed Rule Making ("FNPRM") that, "We tentatively conclude that incumbent systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's 'band clearing' approach" (FNPRM at page 21), DCL has recently learned from reliable industry sources that the Commission is now considering the imposition of a mandatory relocation policy in conjunction with wide area SMR auctions. As a result, DCL is filing this Ex Parte Presentation because it believes that mandatory relocation will: (1) dramatically decrease revenues raised in any proposed wide area SMR auctions; (2) result in a closed and private auction for Nextel and its affiliates ("Nextel"), and, thus, a virtual "gift" of huge amounts of radio spectrum to Nextel; and, (3) eliminate much competition while ensuring that a near Nextel monopoly will control the SMR industry, dictating what SMR services, as well as prices, will be charged to the consumer.

III. Nextel's Enormous "Warehouse" Of SMR Frequencies Ensure That Mandatory Relocation Will Minimize Potential Auction Revenues

Simply put, mandatory relocation actually closes entry to the proposed wide area SMR auctions because it eliminates all participants who do not possess huge amounts of warehoused "substitute" frequencies on which to relocate incumbent licensees. Thus, because **only** Nextel has warehoused huge amounts of nationwide SMR frequencies, Nextel is the only existing company who can actually use a mandatory relocation policy to **both** force incumbent licensees off spectrum bands purchased, while preventing would-be auction participants from bidding on MTAs in which Nextel controls the bulk of "substitute" frequencies (i.e. most MTAs in the country). Thus, mandatory relocation is the ideal mechanism by which Nextel could obtain nearly autonomous control over the SMR industry, while ensuring that it pays miniscule fees for its wide area licenses.

Even the Commission's elimination of the wireline eligibility prohibition into the SMR industry will not foster competitive bidding in prospective wide area SMR auctions because wireline companies do not possess sufficient "substitute" frequencies on which to relocate incumbent licensees. In fact, since the Commission placed its August 1994 freeze on the acceptance of applications for new YX licenses, DCL has been informed that Nextel and/or its affiliates have been filing mountainous volumes of applications for GX channels in order to warehouse additional spectrum in anticipation of future incumbent licensee relocations. Clearly, mandatory relocation does not serve the public nor does it serve the Commission. Mandatory relocation serves only one purpose - to advance the individual business plan of Nextel.

IV. Voluntary Relocation Will Maximize Revenues In Wide Area SMR Auctions

If, however, auctions are combined with a voluntary relocation policy, wireline telcos and other companies will have greater incentive to bid for SMR wide area licenses because they are just as capable (if not more so) of merging with or negotiating other voluntary arrangements with incumbent licensees as is Nextel. The lack of "substitute" frequencies becomes much less of an obstacle to would-be SMR auction participants under a voluntary, as opposed to mandatory, relocation scenario and places all auction participants on a more level playing field. Clearly, if the Commission is to achieve its goal of maximizing SMR wide area auction revenues, it must open auction participation, to the extent possible, by avoiding the adoption of mandatory relocation which so "tilts the scales" in Nextel's favor, in most MTAs, that competitive bidding would be impossible (i.e. mandatory relocation equates to a private, not public, auction for Nextel only).

V. Publicly Stated Commission Objectives Will Be Defeated If Mandatory Relocation Is Combined With Wide Area SMR Auctions

In the Commission's Further Notice Of Proposed Rule Making ("FNPRM"), it stated that: "We tentatively conclude that incumbent systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's proposed 'band clearing' approach. We are concerned that mandatory relocation could impose significant cost and disruption on incumbent licensees and their customers....mandatory relocation would inevitably draw the Commission into disputes between licensees over substitutability of channels, compensable costs, and other related issues. In addition, relocation is likely to be complicated as a practical matter by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the MTA blocks on a one-to-one basis. If this is the case, mandatory relocation could require us to become involved in decisions about which incumbents are required to relocate and which are not." (FNPRM at pages 21 to 22).

As noted above in the Commission's own FNPRM, not only would mandatory relocation disrupt a healthy SMR industry, but it most certainly would draw the Commission into endless legal disputes over the substitutability of channels, compensable costs, etc., as well as which incumbents are required to relocate and which are not. Mandatory relocation would place the Commission at the center of countless legal battles between, justifiably angry incumbent licensees and wide area auction winners, wasting years in the courts, taxpayer dollars, and substantially impeding development and progress in the SMR industry. DCL has been in contact with numerous SMR industry participants who intend to appeal any mandatory relocation policy, if adopted, vis-a-vis all available legal channels.

VI. Chairman Hundt's Publicly Stated SMR Industry Objectives Will Be Defeated If Mandatory Relocation Is Combined With Wide Area Auctions

As a further indication of public policy, and in his March 10th, 1995 letter to Senator Bob Packwood (in which FCC Chairman Reed Hundt responds to various questions regarding the need for wide area SMR auctions and the impact of auctions on a vibrant and competitive SMR industry) Chairman Hundt writes the following: (1) *"The effort seeks to enhance competition among mobile service providers";* (2) *"ensure that economic forces, not regulatory decree, define the marketplace.";* (3) *"the Commission is committed to setting the proper balance between the important interests of small businesses operating local SMR systems and those offering wide area services.";* (4) *"competitive bidding will further the public interest objectives stated in 309(j)(3) by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public";* and, (5) *"The proposal seeks to create incentives for licensees to enter into voluntary arrangements that allow cooperative use of spectrum within an MTA block"* (selected quotes from Chairman Hundt's letter to Senator Bob Packwood on March 10th, 1995, numbers and emphasis added).

Clearly, Chairman Hundt has admirable and commendable objectives, with which DCL is in complete agreement. However, DCL seeks to point out that mandatory relocation will not accomplish any of Chairman Hundt's objectives. Again, given Nextel's extraordinary and incomparable warehouse of "substitute" and other SMR frequencies, mandatory relocation will ensure the following: (1) a dramatic reduction in competition among SMR service providers; (2) that regulatory decree, and not economic forces, shapes the SMR industry marketplace; (3) because the interests of one large SMR operator are so heavily favored over the interests of hundreds of smaller SMR operators, the SMR industry will be thrown irrevocably out of balance; (4) auction revenues will be reduced to the lowest possible levels; and, (5) incentives to

arrive at voluntary arrangements to allow cooperative use of spectrum within an MTA block would be so minimal (in light of a mandatory relocation policy) that forced, and not cooperative, arrangements to utilize spectrum within an MTA block, will govern the SMR industry.

VII. Even Under Optimum Conditions, Auctions Will Generate Relatively Small Revenues And Are Not The Most Efficient Wide Area SMR Licensing Mechanism

Even under optimum conditions, in which the Commission adopts a voluntary relocation policy, it is unlikely that the Commission will be able to raise substantial revenues vis-a-vis the auctioning of wide area SMR licenses. Because nearly all SMR spectrum in the country is already licensed and in use, any attempt to auction this heavily congested spectrum will result in sufficient complications and problems to any auction winner that bidders will not pay dearly for the "privilege" of undertaking the challenge of utilizing these already heavily utilized channels. Unlike the PCS auctions, in which microwave incumbents inhabit only a small fraction of the airwaves recently auctioned, SMR incumbents inhabit nearly all of the proposed SMR airwaves to be auctioned in most MTAs. Unlicensed "white spaces" are minimal and exist primarily in very rural areas. Thus, any comparison between PCS relocation efforts and prospective wide area SMR relocation efforts is simply invalid. Additionally, the 5 Mhz of SMR spectrum which the Commission proposes to auction is extremely tiny in comparison to the 30 Mhz PCS spectrum bands recently sold at auction. In light of the above, DCL believes that any attempt, no matter how the rules may be configured, to apply auctions to the heavily congested SMR airwaves will result in insignificant revenues to the Treasury.

As noted in its Reply Comments, DCL is in full support of PCIA's SMR wide area

licensing proposal in which PCIA proposes that the Commission accept applications from existing licensees who desire to convert existing "local" licenses into wide area licenses. Such applications would be considered modifications to existing operations, and, as such, not subject to auction. After licensing, operators would negotiate channel swaps or other cooperative networking arrangements. Any areas or frequencies not assigned to existing licensees in this first license modification stage could then be assigned to applicants for entirely new licenses. Issuing licenses in the previously proposed manner would enable the SMR industry to use engineering solutions, negotiation and other means by which to avoid mutual exclusivity in the licensing process and result in the most equitable balance between the interests of large and small SMR businesses. Once again, given that virtually all SMR spectrum which the Commission now proposes to auction is already licensed and in use, such spectrum should not be subject to auction and could be more equitably and efficiently licensed for wide area usage by following a plan similar to that proposed by PCIA.

VIII. Conclusion

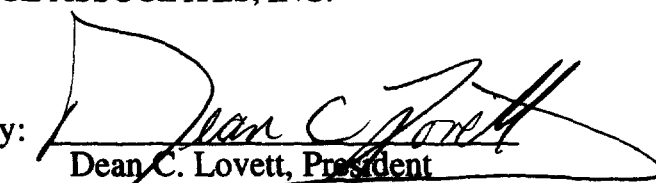
WHEREFORE, pursuant to the above, DCL Associates, Inc. beseeches the Commission to reject the proposal to auction SMR wide area licenses and, instead, to employ the wide area licensing plan as proposed by PCIA. If the Commission deems auctions to be necessary, then DCL implores the Commission not to adopt any sort of mandatory relocation policy which would: (1) destroy competition in the SMR industry; (2) prevent any company without a huge warehouse of "substitute" frequencies from considering participation in wide area SMR auctions and, thus, by regulatory decree, award Nextel a virtual industry monopoly; (3) generate insignificant auction revenues to the Treasury; and, (4) result in years of litigation between incumbent licensees and wide area auction winners. In contrast, a voluntary relocation policy would increase bidding

for wide area SMR licenses because all bidders would be capable of negotiating a merger or other voluntary agreement by which to work with incumbent licensees, thus promoting industry competition and development, while avoiding costly litigation battles.

Respectfully submitted,

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Dated: May 4th, 1995

CERTIFICATE OF SERVICE

I, Terri Thomas, a secretary in the law firm of Keller and Heckman, hereby certify that on this 4th day of May, 1995, I did serve, by first class U.S. mail, postage prepaid, a copy of the foregoing Ex Parte Presentation of DCL Associates, Inc. to the following individuals:

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